voluntarily granted access to the one telephone company that provided that service. For those rare circumstances in which a building owner denied access, the telephone company often could avail itself of its State-granted eminent domain authority, an authority which today is rarely granted to competitive new entrants. Moreover, the costs of the condemnation were recovered from the telephone rate base under rate of return regulation, a cost recovery mechanism not used by competitive new entrants today. As a result, ILECs retain valuable access rights to buildings and rooftops that derive from their incumbent monopoly status.

The development of competition through the efforts of the Commission under the 1996 Act encourages facilities-based competitors to seek access to customers in office buildings and multiple dwelling units. However, ILECs fully understand that refusal to share in-building distribution facilities with competitors will impair the ability of the building's tenants to switch carriers. Absent Commission action, ILECs will continue to impede efforts to open access to the building bottleneck for competitors.

III. SOME BUILDING OWNERS USE THEIR CONTROL OVER BOTTLENECK FACILITIES TO REFUSE BUILDING ACCESS ENTIRELY WHILE OTHERS SEEK TO EXTRACT UNREASONABLE RATES AND CONDITIONS FOR ACCESS.

Some building owners are pleased to grant access to more than one telecommunications competitor because they realize that their buildings (and lease agreements) are more valuable if tenants can choose between several competing companies to secure the package that is best for them. Multiple access then becomes

a goodwill tool and a business selling point for these building owners: tenants can negotiate lower cost telephone service and enjoy unique service offerings.

By contrast, other building owners assume the role of the monopolist over the last hundred yards of the network under their control by either denying building access entirely, or extracting unreasonable rates or conditions from competitors in exchange for access. This building owner behavior artificially inflates tenants' rates for telecommunications service and decreases competitive choices.

Moreover, some building owners contract away access rights to riser and rooftop management companies in an effort to fully exploit their market power. One riser management company's brochure states that "new competitors to the local telephone company want access to your tenants. Your 'free' riser space has become a valuable commodity for today's new telephone service providers." It goes on to proclaim that local competition presents the building owner an "opportunity to realize substantial new revenue from existing unmanaged space" creating "a new monthly revenue source within" the building. These companies retain the unwholesome incentive and ability to extract monopoly rents from competitive telecommunications carriers at the expense of consumers.

A. Building Owners' Restrictions On Access Reduce Competitive Benefits To Tenants.

Access to telephone inside wire and riser cables is not only an issue of telecommunications competition, but also an issue of tenant protection.[7] The protection of the interests of U.S. business and residential telecommunications consumers is one of the core obligations of the Commission. The philosophy underlying the 1996 Telecommunications Act is to encourage the availability of competitive telecommunications service alternatives for all Americans and their businesses, regardless of whether they live and work in a single family home or a multi-unit building. Granting building tenants access to competitive carriers is central to the achievement of that goal.[8]

In effect, some building owners pocket the rate reductions and other benefits of competition that would otherwise accrue to their tenants. Congress clearly intended and expected that most of the benefits of telecommunications competition would accrue to

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7 Commissioner Ness recently observed that over 30% of Americans live in multiple dwelling units. See "...And Miles To Go Before I Sleep," by Commissioner Ness (as prepared for delivery before the New England Chapter of the Federal Communications Bar Association, May 29, 1997). This figure does not include the number of American businesses that are located in office buildings. Hence, restrictions on building access affect an enormous number of U.S. telecommunications consumers.

8 Others around the world are recognizing that resolving this issue is vital to competition. For example, Hong Kong offers guidelines to secure building access for the provision of telecommunications services. A copy of the Hong Kong Building Access Guidelines is attached to these Comments as Attachment B. The Guidelines are also available on the Web at http://ofta.gov.hk/tas/t-ftn/95e181a.html.

consumers. Some building owners and their management companies siphon off these benefits from the tenants to whom Congress intended those benefits to flow.

Moreover, the issue is not limited to the distribution of benefits; there are spill-over effects of this behavior, as well. The building owners' access restrictions can leave some consumers without any facilities-based alternative for telecommunications services. Any reduction in the addressable market for wireline and wireless competitors will reduce competition and dynamism throughout the greater telecommunications market, not just the market of tenants in buildings.

The effect of access restrictions mirrors the uneconomic effects of local monopolies that Congress sought to open to competition through the 1996 Act. Because some building owners prohibit or assess unreasonable fees for competitive carrier building access, the price of access to competitive telecommunications services for office building tenants is not set in relation to a competitive market. Rather, it is established through the exercise of monopoly power. The owner of a building is in the same position that the owner of the local telephone network has been for decades. Generally, competitors cannot reach tenants in the building without going through the building owner, just as formerly there was no way to reach local exchange customers without going through the local telephone monopoly. Because the uneconomic exploitation of the 1996 Act through exertion of bottleneck control will hurt consumers and

undermine the goals of the 1996 Telecommunications Act, it should be remedied by the Commission.

B. The Lock-In Effect Hinders Natural Market Adjustment.

The argument that all a tenant need do is move to another building misapprehends the economic realities of commercial tenancy. Natural market adjustment will be slowed substantially due to the lock-in effect of long-term leases. This phenomenon was noted by the Building Owners' Management Association ("BOMA") in its effort to argue that building owners should not have to bear the maintenance costs of riser cable in multiunit buildings. As the Commission noted in its Inside Wire Reconsideration Order, BOMA asserted that "many tenants have long term leases that will prevent building owners from passing on [the] additional costs [of riser maintenance] to their tenants."[9]

The lock-in effect, a concept well-grounded in legal and economic precedent, was addressed by the Supreme Court in its 1992 Kodak decision.[10] Kodak was charged with seeking to impose high service costs on purchasers of its copier equipment who were locked into long-term service agreements. The Court noted consumers' lack of information about better deals, and stated

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9 Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, CC Docket No. 88-57, *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-209 at ¶ 25 (rel. June 17, 1997) ("Inside Wire Reconsideration Order") (emphasis added).

10 Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).

that "even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive."[11] Although some sophisticated customers may be able and willing to assume the costs of the requisite information gathering and processing, the Court noted that

> [t]here are reasons . . . to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too . . . . [I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.[12]

Even those customers with sufficient information may suffer uneconomic exploitation from the lock-in effects. As the Court observed,

> [i]f the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands.[13]

The economic concept of "lock-in" effects is well established and also was part of the explanation for the Department of Justice's recent insistence on a phase-out period for the 1956 IBM consent decree; the Department sought, among other things, to ensure that any mainframe users who wanted to switch computer platforms due to termination of the decree could

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11 Id. at 474.

12 Id. at 475.

13 Id. at 476.

do so over time since their enormous software investment would leave them "locked-in" for years to IBM.

The situation described by the Supreme Court in Kodak is closely analogous to that of small to mid-size commercial tenants in long-term leases who wish to take local telephone service from a competitor. Many tenants entered into existing leases before true competitive choices in telecommunications were a viable option and had no way of knowing that these choices would become available. Therefore, such tenants could not and would not have negotiated for the competitive carrier access in their leases necessary to allow them competitive local exchange service.

Moreover, the cost of breaking a commercial lease and moving is prohibitively expensive (and, nonetheless, should not be a precondition to enjoying the benefits of local telephone competition). Although it is possible that a few sophisticated customers may have negotiated or renegotiated lease terms to provide for competitive carrier building access, many smaller businesses and individuals almost certainly have not realized the benefits of their sophistication, particularly due to the building owner's ability to discriminate among tenants with respect to lease terms and conditions. Therefore, many tenants find themselves locked-in to arrangements that preclude affordable access to competitive options in local exchange service.

IV. THE COMMISSION SHOULD ENSURE THAT CARRIERS RECEIVE THE REQUISITE BUILDING ACCESS THROUGH ITS INTERPRETATION OF SECTION 224 AND ITS REGULATION OF INSIDE WIRE.

A. Section 224 Should Be Interpreted To Include Access To Rooftops With A Utility Presence.

In an effort to reduce barriers to competition by facilitating access to rights-of-way, Congress enacted Section 224 and recently amended the provision in the 1996 Act.[14] The provision offers the Commission a pro-competitive tool to remove building access restrictions. However, a narrow interpretation of Section 224 could result in a wireline bias and unnecessarily restrict the possible sources of local exchange competition. For example, due to the wireline nature of older technologies, incumbent utilities did not often require access to the roofs of buildings for their distribution facilities. A new technology that relies upon rooftop antennae to transmit wireless signals does not fully realize the competitive value in Section 224 if that provision is interpreted from an historical wireline perspective to exclude rooftop access. The Commission should clarify that rooftop access is mandated under the Act.

Utility-owned or controlled rights-of-way are bottleneck facilities and access to them is an essential precondition to local exchange competition.[15] Although rights-of-way are not

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[14] See 47 U.S.C. § 224(f)(1) which states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

[15] See, e.g., "Pepco Plans Phone, Web, Cable Service" by Martha M. Hamilton and Mike Mills, The Washington Post at A12 (In reporting on the PEPCO/RCN venture to offer telephony and

defined in the Act, the express application to "any . . . right-of-way"[16] and the absence of any limitation in Section 224 to public rights-of-way, as in Section 253(c), demonstrates an intention to give the Commission authority over all rights-of-way, private and public, owned or controlled by utilities.[17] Hence, a plain reading of Section 224 demonstrates that it applies whether a right-of-way allows a utility to place its distribution facilities under a city street or on a building's rooftop.[18] When a general right-of-way throughout a building is

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video services in the District of Columbia, the article notes that "Pepco's more important contribution to the venture is its vast network of access to the region's homes and businesses through the rights of way it owns to provide electrical power." The incumbent advantage of not encountering right-of-way entry barriers is reflected by a Bell Atlantic vice president's comment: "They've already got rights of way and conduits. They certainly have the skills and the work force to pull more fiber in, just like they could pull in electrical wires." The underlying transaction only underscores that electric company rights-of-way should be equally available to all telecommunications carriers.)

16 See 47 U.S.C. § 224(f)(1)(emphasis added).

17 Section 253(c) specifically applies only to "public rights-of-way." 47 U.S.C. § 253(c)(emphasis added).

18 In its Interconnection Order, the Commission declined to interpret Section 224 as requiring a utility generally to make space available on the roof of all of its own corporate offices for the installation of a telecommunication carrier's antenna. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1185 (1996) ("Interconnection Order"). This decision does not reach a utility's building access obligations under Section 224 when its distribution facilities extend to the rooftop of a building pursuant to a right-of-way from the building owner. The Commission has recognized that "[t]he intent of Congress in section 224(f) was to permit . . . telecommunications carriers to 'piggyback' along distribution networks owned or controlled

maintained by a utility, because it constitutes a bottleneck facility to which competitive telecommunications carriers must have access to serve customers, the Commission should use its Section 224 authority to require the utility to provide rooftop access for telecommunications carriers.[19]

Section 224 contains a reverse preemption provision which allows a State to assume jurisdiction over rights-of-way regulation, but only if it does so in an "effective" manner and so certifies. While Section 224 obligates the Commission to act, it does not establish an "all or nothing" structure in which two jurisdictions battle for authority.[20] Rather, Section 224,

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by utilities." Id. This interpretation of Section 224(f) counsels strongly in favor of adopting Teligent's position that where a utility's distribution facilities exist on a building rooftop by virtue of a right-of-way, Section 224 continues to apply as it would on a street -- namely, it continues to require the provision of access to the right-of-way for telecommunications carriers.

19 The Commission's use of Section 224 to effect rooftop access obligations will avoid any remotely colorable takings claims by utilities. Congress provided for any required compensation for the use of rights-of-way through Subsections 224(d) and (e)'s prescriptions for just and reasonable rates. The Commission may wish to clarify the appropriate application of the statutory formula to rights-of-way although, in practice, the formula may be used simply to define the range of acceptable privately negotiated rates.

20 See 47 U.S.C. § 224(c)(1). The scope of Section 224's reverse preemption provision is limited and does not eliminate the Commission's authority to regulate rights-of-way. Section 224(c)(1) states that "[n]othing in this section shall . . . give the Commission jurisdiction with respect to . . . access to . . . rights-of-way . . . in any case where such matters are regulated by a State." (emphasis added) Therefore, although Section 224(c)(1) provides for the exercise of State authority, it cannot limit the Commission's jurisdiction over rights-of-way derived from other parts of the Act, such as authority to take action

although creating a duty for the Commission to act when not all States have done so, designs a dual regulatory structure that offers the opportunity for a harmonious resolution of the issue through cooperative efforts between the Commission and the States. Ultimately, this structure protects consumers by providing for State authority over those matters that the State is regulating effectively while leaving enforcement of all other Section 224 provisions to the Commission's jurisdiction.

Section 224 requires States, if they choose to use the "reverse preemption" scheme of Section 224, inter alia, to issue and make effective rules over the rates, terms, and conditions of rights-of-way.[21] In fulfilling its statutory obligations, the Commission must look behind a State certification of regulation under Section 224(c)(2) to determine whether the State has enacted rules to provide nondiscriminatory access which are "effective."[22]

Before adoption of the 1996 Act, when Section 224 extended rights to cable operators but not to telecommunications carriers, the Commission indicated its unwillingness to look behind a State certification of regulation for substantive review.[23] However,

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pursuant to Sections 253 (eliminating barriers to entry), 332(c)(7) (eliminating barriers to entry and other siting restrictions for personal wireless services), and 706 (the promotion of advanced telecommunications services).

21 See 47 U.S.C. § 224(c)(2)(A) and (3)(A).

22 See 47 U.S.C. § 224(c)(3)(A) (requiring state issuance of effective rules).

23 See, e.g., Certification by the Maryland Public Service Commission Concerning Regulation of Cable Television Pole

the 1996 Act significantly changed the scope of Section 224. For example, the 1996 Act imposed the obligation on a utility to provide nondiscriminatory access to any right-of-way owned or controlled by it.[24] Moreover, where the benefits of Section 224 used to apply only to cable television systems, the 1996 Act extended the access benefits to non-ILEC telecommunications carriers in order to advance the Act's goal of promoting telecommunications competition for all services.[25] Finally, in the 1996 Act, Congress added new rate structures,[26] created notice requirements[27] and modification requirements,[28] and imposed additional State certification requirements.[29] As a result, regulators must implement a significant number of new federally-mandated requirements. The changed circumstances caused by the 1996 Act, as well as the Commission's generally expanded responsibilities to oversee the implementation of local

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Attachments, File No. ENF 85-46, *Memorandum Opinion and Order*, Mimeo No. 3621 at ¶ 5 (1986)("While we believe that a regulatory scheme should be specific enough to put the parties on notice as to how a complaint will be handled, we will not look behind a certification unless we have evidence that a party is unable to file a complaint with the state Commission or the state Commission has failed to act on a complaint within the prescribed period").

24 47 U.S.C. § 224(f)(1).

25 Id.; see also 47 U.S.C. § 224(a)(4).

26 47 U.S.C. § 224(d)(3) and (e).

27 47 U.S.C. § 224(h).

28 47 U.S.C. § 224(h) and (i).

29 47 U.S.C. § 224(c)(2)(B)(requiring States to consider the interests of subscribers of the services offered via the

exchange competition, plainly render certifications made prior to the 1996 Act incomplete and ineffective. These changes also warrant reconsideration of the Commission's policy of not looking behind State certifications.[30] In reviewing State certifications, whether they are "renewal" certifications or first-time certifications, the Commission should require that States' right-of-way regulations satisfy the Commission's baseline rules as a means of ensuring "effective" rules under Section 224(c)(3)(A). This oversight will protect consumers' abilities to access facilities-based alternatives regardless of the responsible regulating body.[31]

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attachments, not just the subscribers of cable television services).

30 See Bechtel v. F.C.C., 957 F.2d 873, 881 (D.C. Cir. 1992), cert. denied, Galaxy Communications v. F.C.C., 506 U.S. 816 (1992) ("[C]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy . . ."); see also Geller v. F.C.C., 610 F.2d 973, 979 (D.C. Cir. 1979)(noting the Commission's duty to reexamine policies in light of changed circumstances).

31 On reconsideration of the Interconnection Order, the Commission has before it the issue of rooftop access for fixed wireless carriers pursuant to Section 224's provision of access to utilities' rights-of-way. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *WinStar Communications, Inc. Petition for Clarification or Reconsideration* (filed Sep. 30, 1996)("WinStar Petition"). The Commission's ongoing consideration of this issue, and the opportunity granted to parties for notice and comment, allows it to fashion appropriate rules in an expeditious manner, consistent with the clear meaning of Section 224.

B. The Commission Should Require Building Owners And Utilities To Permit Telecommunications Carrier Access to Telephone Inside Wire And Risers.

The Commission has noted the importance of access to inside wire in multi-tenant buildings for competitive carriers[32] and has contemplated the competitive implications of restrictions on building access.[33] These observations should motivate the Commission to ensure that competitive carriers can obtain access to the risers within a building, as well as the telephone inside wire to the customers' premises, in order to provide competitive telecommunications service.[34] Otherwise, many businesses and individuals in multi-tenant buildings will not be full participants in the savings and innovation of a competitive telecommunications market.

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32 See Interconnection Order at ¶ 392 ("When a competitor deploys its own loops, the competitor must be able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings"). The Commission sought to provide this access by requiring ILECs to offer access to their network interface devices on an unbundled basis. See id.

33 See Telecommunications Services Inside Wiring, CS Docket No. 95-184, *Notice of Proposed Rulemaking*, 11 FCC Rcd 2747 at ¶ 61 (rel. Jan. 26, 1996)("Inside Wire Notice")("if one service provider has an unrestricted right of access to private property -- even over the objection of the property owner -- that service provider would be able to compete for individual subscribers in every multiple dwelling unit building, private housing development and office building, while the provider without such a right could only compete in those buildings in which it had managed to obtain the property owner's consent"). This rulemaking remains pending and offers the Commission an ideal forum for ensuring, in a timely and effective manner, that all telecommunications carriers enjoy the right of access to telephone inside wire and riser cables within office buildings. WinStar Communications recently filed comments in this rulemaking concerning the issue of building access. See Telecommunications Services Inside Wiring, CS Docket No. 95-

In its Interconnection Order, the Commission required ILECs to offer access to their NIDs on an unbundled basis but did not provide access to riser cables within a building.[35] Access to the ILEC's NID, an important element in providing telecommunications service to a multi-unit building, is obtained at ground level by carriers delivering service with copper or fiber. However, the CLECs delivering service with microwaves obtain NID access by using the building's riser cables between the rooftop, the CLEC IDU, and the ground-level ILEC NID

184, *Comments of WinStar Communications, Inc.*(filed Aug. 5, 1997).

34 The mandatory provision of access to telephone inside wire and risers will not raise complicated takings issues because their use does not qualify as a physical invasion as described in Loretto. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). For purposes of a takings analysis, the difference between a physical invasion and mere use is a crucial distinction. See id. at n.12.

Nevertheless, to the extent that a building owner permits a utility to run its own risers and wires through a building, the Commission should mandate that the building owner treat competitive telecommunications carriers in a nondiscriminatory fashion. That is, if a utility is permitted to occupy riser space with its own facilities (rather than those of the building owner) or otherwise install its own equipment, the building owner should be required to permit such occupation and installation by competitive telecommunications carriers on a nondiscriminatory basis, as well.

35 See Interconnection Order at ¶ 392 and n.853 (noting the importance of a competitor being "able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings" but nevertheless stating that "access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled . . . by the premises owner").

location. As part of its unbundling requirement, the Commission can and should ensure that competitive carriers have access not only to the ILEC's NID, but also to the riser cables of office buildings so that microwave CLECs can avail themselves of the NID access that wireline CLECs can utilize.

C. The Small Number of States Mandating Building Access Compels Commission Action.

A number of states have addressed the building access issue through legislation or, in one instance, through a Public Utility Commission order. For example, Section 16-2471 of the Connecticut General Statutes requires building owners to allow a telecommunications provider to install wire to provide service so long as: (1) a tenant requests services from the provider; (2) the costs are assumed by the telecommunications provider; (3) the provider indemnifies the building owner for any damages caused by the wiring; and, (4) the provider complies with State inside wire regulations.[36] The statute allows for reasonable compensation. A similar Texas statute prohibits property owners from interfering with or preventing a telecommunications utility from installing telecommunications service facilities on the owner's property at the request of a tenant.[37] Once again, the statute allows for reasonable compensation while prohibiting the building owner from demanding unreasonable payments.

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[36] See Conn. Gen. Stat. Ann. § 16-2471 (West 1997).

[37] See Tex. Rev. Civ. Stat. Ann. art. 1446c-0, § 3.2555 (West 1997).

Lacking a State statute to this effect, the Public Utilities Commission of Ohio held in an order that

> no person owning, leasing, controlling, or managing a multi-tenant building shall forbid or unreasonably restrict any occupant, tenant, lessee, or such building from receiving telecommunications services from any provider of its choice, which is duly certified by this Commission.[38]

Teligent supports the efforts of these states to ensure tenant access to competitive telecommunications markets and encourages similar action by other states. But, the Commission must adopt rules that govern states that have not acted similarly.[39]

In light of the fact that most states have not effectively addressed the building access issue to date, Section 253(a)

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38 Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, *Supplemental Finding and Order*, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sep. 29, 1994).

39 The concept of mandatory building access has arisen in many states to benefit the ILEC. In the context of Shared Tenant Services, many State PUCs have required STS providers to allow ILEC access to tenants who prefer to take service from the ILEC over the STS provider (often the building owner). Florida offers a recent example. In April, the Florida Public Service Commission required all STS providers to allow LECs direct access to tenants who want local service from the LEC. Moreover, the Order provides for reasonable compensation for LEC use of the STS provider's or the building owner's cable. In the event that the STS provider and the building owner are not the same entity, the Order requires that the STS provider guarantee and obtain the permission of the building owner for the requisite LEC access. See Proposed Amendment of Rule 25-24.575, F.A.C., Shared Tenant Service Operations, and Proposed Adoption of Rule 25-24.840, F.A.C., Service Standards, Docket No. 961425-TP; *Order No. PSC-97-0437-FOF-TP*, 97 FPSC 325 (Fla. PSC Apr. 17, 1997). Conceptually, the same requirements could be made available to CLECs.

provides an additional source of Commission authority. If States, by not expressly forbidding access restrictions, protect the ability of building owners to restrict competitive carrier access, the Commission must assume responsibility. The Commission can address the restrictions directly through its Section 224 authority wherever utilities maintain rights-of-way. Alternatively, the Commission can recognize that a State's silence on this issue (and the building owners' concomitant legal authority under State laws to restrict access) operates as a barrier effectively prohibiting competition which mandates Commission action under Section 253(a).[40]

In addition, Section 706 of the 1996 Act supports the Commission's requirement of building access.[41] Section 706 requires the Commission to promote deployment of advanced telecommunications capability to all Americans in a timely fashion.[42] Teligent already provides and intends to continue providing advanced telecommunications capability to consumers through its provision of high-speed data services and Internet

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40 It is significant that the preservation of State and local government authority in Section 253(c) is limited to public rights-of-way. See 47 U.S.C. § 253(c).

41 Pub. L. No. 104-104, 110 Stat. 56, 153 at § 706 ("Section 706").

42 See Section 706(c)(1)("The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology").

access. By enhancing the ability of carriers like Teligent to offer these advanced telecommunications services, federally-mandated building access regulation would promote the objectives of Section 706.

V. THE COMMISSION POSSESSES THE AUTHORITY TO GRANT TELECOMMUNICATIONS CARRIER ACCESS TO BUILDINGS.

The Commission receives authority from many different sources to grant access to building rooftops, riser space, and telephone inside wire. As noted above, several sections of the Communications Act direct the Commission to take action consonant with the building access sought by Teligent. Moreover, judicial rulings, including the Eighth Circuit's recent opinion in Iowa Utilities Board v. F.C.C., confirm the Commission's authority over the States to mandate the requisite building access and the Commission's personal jurisdiction over building owners necessary to order building access.

A. The Eighth Circuit's Recent Decision Confirms The Commission's Significant Authority To Regulate Building Access.

While the Eighth Circuit's recent decision concerning the Commission's Interconnection Order would circumscribe the Commission's authority regarding some matters,[43] the decision confirms the Commission's authority and duty to act under Section 224. As discussed below, action by the Commission to implement Section 224 simply is not subject to a Section 2(b) analysis. Moreover, the Commission's interpretation, in light of its

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[43] Iowa Utilities Board v. F.C.C., No. 96-3321 (8th Cir. July 18, 1997).

plenary authority, will be afforded Chevron deference by reviewing courts.[44]

In Iowa Utilities Board, the court observed that because Congress amended Section 2(b) to grant exclusive jurisdiction to the Commission over the regulation of CMRS rates and entry, Commission action taken pursuant to Section 332 is not subject to the traditional Section 2(b) analysis.[45] The exemption led the court to retain Commission rules from the Interconnection Order, otherwise vacated, as they apply to CMRS providers,[46] confirming the Commission's plenary authority under Section 332 due to its express exemption from Section 2(b).

The same analysis would apply to the Commission's authority to regulate access to rights-of-way under Section 224. As with Section 332, Congress expressly exempted Section 224 from the reach of Section 2(b).[47] Therefore, the Commission retains exclusive authority to interpret and implement the terms of Section 224 without Section 2(b) limitations and subject only to a State's appropriate use of the reverse preemption provision contained in Section 224. To use the language of the Eighth Circuit, the Commission has no "2(b) fence" to overcome in its regulation under Section 224.

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44 See Chevron, U.S.A., v. Natural Resources Defense Council, 467 U.S. 837 (1984).

45 See Iowa Utilities Board at n.21.

46 See id. at n.39.

47 See 47 U.S.C. § 152(b) ("Except as provided in sections 223 through 227, inclusive, and Section 332 . . . ").

B. Case Law Sustains FCC Jurisdiction Over Access To Telephone Inside Wire and Riser Cables.

Inside wiring, like consumer premises equipment ("CPE"), plays a critical role in the transmission of interstate communications. As the Fourth Circuit noted with respect to CPE,

> [u]sually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions.[48]

The Commission has recognized that inside wiring shares this attribute of CPE.

> [T]he provision of inside wiring cannot, as a permanent matter, be subject to separate federal and state requirements. . . . Since inside wiring is . . . jointly used for interstate and intrastate services, it 'is a practical and economic impossibility' for customers to have two inside wiring systems, one for interstate uses and another for intrastate uses.[49]

The interstate communications function of inside wire and riser cables permits regulation by the Commission pursuant to its authority over interstate communications in Section 2(a). The judicial precedent supports this conclusion.

For example, in Louisiana PSC, the Supreme Court observed that "state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of the full

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[48] North Carolina Utilities Comm. v. F.C.C., 537 F.2d 787, 791 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976).

[49] Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, *Memorandum Opinion and Order*, 1 FCC Rcd 1190 at ¶ 18 (1986), quoting North Carolina Utilities Comm. v. F.C.C., 552 F.2d 1036, 1043 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977).

purposes and objectives of Congress."[50] The objectives of Congress are clear. Since its inception, the Communications Act has described the central purpose of the Commission as the regulation of wire communication

> "so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide . . . wire . . . communication service."[51]

The philosophy of promoting nationwide telecommunications was expanded and reemphasized in the 1996 Telecommunications Act.[52]

Using its interstate authority, but exercising only indirect jurisdiction, if it chooses, the Commission can require access to inside wire. In some instances in which the Commission's personal jurisdiction over particular entities was challenged, the Commission has nonetheless been able to foster important pro-competitive goals indirectly by imposing relevant requirements on entities over which it clearly has jurisdiction. For example, through this exercise, the Commission has controlled the telephone rates of hotel owners by placing requirements upon carriers,[53] and has accomplished effective regulation of

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50 Louisiana Public Service Comm. v. F.C.C., 476 U.S. 355, 374 (1986).

51 47 U.S.C. § 151 (emphasis added). The policy applies to individuals living and working in multi-unit buildings.

52 See S. Rep. No. 230, 104th Cong., 2nd Sess. at 1 (Conference Report accompanying the Telecommunications Act of 1996 noting purpose of Act being "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans").

53 Ambassador, Inc. v. United States, 325 U.S. 317 (1945).

broadcast network activities through its regulation of individual broadcast licensees.[54] Likewise, the Commission's jurisdiction over building owners could be exercised indirectly by prohibiting ILEC interconnection with inside wire facilities not available on a nondiscriminatory basis to competitive carriers.

The Commission also may regulate access to inside wire pursuant to its direct jurisdiction. The Commission's authority to regulate cable television offers a close analogy. Although cable television facilities were almost entirely intrastate and were operated by individuals not previously regulated by the Commission, they carried interstate (in this case, broadcast) signals over which the Commission retained clear authority.[55] Before the words "cable television" appeared in the Communications Act, a line of cases developed the Commission's authority to regulate extensively cable television systems ancillary to its jurisdiction over broadcasting. These cases explain that cable television systems fall literally within Section 2(a)'s grant to the Commission of jurisdiction over interstate wire communication. Moreover, they note that the purpose of the Commission's cable television regulation is fairly derived from the substantive goals of the Act as they relate to broadcast television.

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54 CBS v. F.C.C., 453 U.S. 367 (1981); see also Mt. Mansfield Television v. F.C.C., 442 F.2d 470 (2nd Cir. 1971).

55 Capital Cities Cable v. Crisp, 467 U.S. 691 (1984); United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable, 392 U.S. 157 (1968).

The Commission's authority to regulate non-carrier-owned inside wire becomes apparent when viewed through such an analysis. Like cable television, non-carrier-owned inside wiring facilities are almost all confined within one state's boundaries and are owned by entities not licensed by the Commission. Nevertheless, inside wiring facilities transmit interstate communications signals, thereby coming within the literal terms of the Commission's authority. Moreover, like cable television regulation, the Commission's direct authority to regulate non-carrier-owned inside wiring is derived as reasonably ancillary to the effective performance of its responsibilities in the regulation of common carriers under Title II.[56]

Finally, concurrent state and federal building access regulation may be incompatible: federal access guarantees would be negated by state laws permitting building owners to restrict access (or by the absence of affirmative obligations to provide access). Where, as with the case of control over inside wire, the subject matter of the regulation cannot be separated into interstate and intrastate components, federal preemption is warranted in those instances where State regulation would negate federal regulation.[57]

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[56] If the Commission would find it helpful, Teligent would be pleased to provide a more expansive analysis of the Commission's jurisdictional authority for these purposes.

[57] See Louisiana Public Service Comm. v. F.C.C., 476 U.S. at n.4.

The decisions of the Appeals Courts are consistent with this position.[58] Considering installation and maintenance of inside wiring, the D.C. Circuit noted that the Commission "may preempt inconsistent state regulation so long as it can show that the state regulation negates a valid federal policy."[59] The Ninth Circuit applied a similar rationale to affirm the Commission's preemption of State regulation of enhanced services by common carriers inconsistent with or more stringent than the Commission's non-structural safeguards.[60] The jurisprudence thus provides ample support for the Commission's authority to regulate building access for telecommunications carriers.

VI. THE COMMISSION SHOULD ENSURE THAT GOVERNMENT MANAGEMENT DOES NOT CREATE BARRIERS TO ENTRY.

In some instances, governments are erecting barriers that impede competition, raise costs, and deprive consumers of the full benefits of competition. The Telecommunications Act of 1996 is designed to facilitate competition in the provision of telecommunications services and, by its terms, intends that

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58 See, e.g., North Carolina Utilities Commission, 537 F.2d at 795-796 ("the Communications 'Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole"), quoting General Telephone Co. of California v. F.C.C., 413 F.2d 390, 398 (1969), cert. denied, 396 U.S. 888 (1969).

59 National Association of Regulatory Utility Commissioners v. F.C.C., 880 F.2d 422, 431 (D.C. Cir. 1989).

60 See People of the State of California v. F.C.C., 39 F.3d 919, 933 (9th Cir. 1994), cert. denied, 115 S.Ct. 1427 (1995).